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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-388

BETTY L. GERACE and
ALLEN J. GERACE,

Petitioners,

v.

COUNTY OF LOS ANGELES, a legal subdivision of the State of California, CIVIL SERVICE COMMISSION of the County of Los Angeles, The Office of Sheriff of Los Angeles County, PETER J. PITCHESS, Sheriff,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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Petitioners

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Petitioners, BETTY L. GERACE and ALLEN J. GERACE, respectfully pray that

a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, entered in this proceeding on March 27, 1972.

OPINIONS BELOW

The opinion of the court below was originally reported at 24 Cal.App.3d 347. By order of the Supreme Court of the State of California the reporter of decisions was directed not to publish the opinion in the official appellate reports. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, (Appendix A) was dated and entered March 27,

1972. A timely Petition for Hearing in the Supreme Court of the State of California was denied on June 7, 1972, without opinion. A copy of the order denying hearing is attached hereto as Appendix B. The court below, therefore, became the highest court in the State of California in which a decision could be had.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the ruling of the court below that a police officer may be discharged from his employment based upon

his coerced confession obtained in an administrative investigation under circumstances which forbid its use in a criminal prosecution, deprives Petitioners of due process and equal protection of the laws guaranteed by the Fourth, Fifth and Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether Petitioners were unlawfully discharged from their employment as deputy sheriffs based solely upon their coerced confessions regarding personal, private conduct between themselves as husband and wife, in violation of their right to privacy and due process of law guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

3. Whether, under the due process and equal protection provisions of the

Fourteenth Amendment a police department may conduct an investigation into the alleged criminal misconduct of its police officers in a manner which deprives them of rights accorded to all other persons upon whom suspicion has focused.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution, the pertinent provisions of §§182, 274 and 275 of the California Penal Code, and the pertinent provisions of §§1029 and 26601 of the California Government Code are set forth as Appendix C attached hereto.

STATEMENT OF THE CASE

A. Petitioners, BETTY L. and ALLEN

J. GERACE are husband and wife. They were employed as deputy sheriffs in the Los Angeles County Sheriff's Department and each had obtained permanent status under the Civil Service System of the County of Los Angeles. On August 5, 1969 Petitioners were each served with a Notice of Discharge from their respective positions, as a direct consequence of each Petitioners coerced confession that they had procured an abortion which had been performed on Petitioner, BETTY L. GERACE, in January, 1969.

B. The investigation which resulted in the confessions commenced on May 26, 1969. Petitioner, BETTY L. GERACE, was interviewed by members of the Sheriff's Department who advised her that she was being questioned as to her participation in an alleged abortion

and extortion. She was told that she must make a full, complete and truthful statement and that she should not make any false statements. She advised the Department representatives that she did not want to make a statement until she had talked to someone. The Department representatives then advised her that this was an administrative rather than a criminal investigation, and that:

(a) She did not have the right to have anyone else present;

(b) She did not have the right to confer with anyone;

(c) Compliance with the Manual of Policy and Ethics was a condition of her job and that refusal to answer was grounds for discharge under the Manual, since it would be tantamount to non-cooperation in an official department

investigation pursuant to §3120.71 of the Manual; and

(d) Although she could refuse to answer because of her constitutional rights, she would be subject to discharge.

She then admitted to the Department representatives interrogating her that she had contacted various persons in an effort to secure information as to who she could contact to obtain an abortion, that she had allowed an abortion to be performed upon her person, at her residence, and that she and her husband (Petitioner ALLEN J. GERACE) had jointly paid $700.00 for the abortion.

That same day, Petitioner, ALLEN J. GERACE, told Capt. Elroy Villines that he wanted to discuss a personal matter in private. Capt. Villines informed

Petitioner that he was under investigation and that he would have to give the Department a statement. Petitioner told Capt. Villines that he did not wish to make a statement, but the Captain advised him he had better make one.

Department representatives then advised Petitioner, ALLEN J. GERACE, that he was being investigated with respect to an alleged extortion. He was advised that he must make a full, complete and truthful statement and should not make any false statements. He was not advised that he had a right to remain silent.

Petitioner, ALLEN J. GERACE, admitted that he knew of and approved of an abortion performed on his wife (the Petitioner, BETTY L. GERACE), and that he and his wife had jointly paid $700.00 for the operation. He also admitted

that with the knowledge of his wife he had contacted various persons in order to secure information as to who could perform an abortion.

In the course of the investigation each Petitioner at one time said that the abortion had been performed in Mexico, which admittedly was untrue.

C. In March, 1970, following a hearing at which the evidence was that in the performance of his duties neither Petitioner actively engaged in the investigation of crimes or the apprehension of criminals,[1/] the Commission hearing officers rendered their findings of fact and conclusions of law sustaining the Los Angeles County Sheriff's

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1/ The evidence on this point is uncontradicted, and the decision of the court below accepts this fact as true.

Department in its discharge of Petitioners. The Civil Service Commission accepted the findings and conclusions of its hearing officers and ordered that the appeals of Petitioners be denied.

In substance the Commission found as fact as to each Petitioner that they contacted persons to secure information as to who could perform an abortion upon Petitioner, BETTY L. GERACE; that she had an abortion which Petitioner, ALLEN J. GERACE, allowed to be performed upon her; that both paid for the abortion; and that each lied about the location of the abortion.

From these findings, the Commission concluded in substance, as to each Petitioner that: (1) Their actions in securing an abortion were proscribed

as felonies pursuant to §§182, 274 and 275 of the California Penal Code; (2) They failed to perform their duty as peace officers by not placing each other and the abortionist under arrest; (3) Their actions as set forth in the Commission's findings were directly related to the performance of their duties; (4) The commission of acts proscribed as felonies automatically rendered each Petitioner unfit for further service as a peace officer; and (5) The untrue statement made as to the location of the performance of the abortion rendered each Petitioner unfit for further service as a peace officer.

D. Each Petitioner sought a Writ of Mandate in the Superior Court of the State of California, County of Los

Angeles, compelling the Civil Service Commission to reinstate them in their positions as deputy sheriffs. Their petitions were denied and each Petitioner took an appeal to the Court of Appeal of the State of California, Second Appellate District.

E. In the court below, as they had at each proceeding, commencing with pre-hearing motions before the Civil Service Commission, Petitioners raised constitutional objections to the investigatory process which had resulted in their dismissals. They urged that the confessions illicited from them in the course of the Sheriff's Department investigation were involuntary and had been obtained in violation of their privilege against self-incrimination. They emphasized that they had been

denied the right to counsel and had been given no warning that their statements could be used against them. They argued that the inquiry into their personal lives constituted an invasion of their right to privacy subsumed by the First, Fourth, Ninth and Fourteenth Amendments to the Constitution and that their coerced confessions pertaining to such private conduct were neither admissible against them at the Civil Service Hearing nor could they form the basis for their discharge. They urged that there was no valid, factual evidence to support the finding that they were unfit, and that on the contrary the only evidence pertaining to the performance of their jobs demonstrated their superior qualifications.

The court below brushed aside

Petitioners constitutional arguments. It held, in substance, that a law enforcement officer's official duties are so broad that all aspects of his life are proper subjects for administrative interrogation and hence, that it is proper to compel answers from a police officer or fire him for refusing to answer questions on any subject propounded by the administrative investigators. Rejecting Petitioners' claim that the scope of the interrogation was particularly offensive in this case becuase it pertained to a matter involving their relationship as husband and wife, the court held that the evidence that they had obtained an abortion, no matter how obtained formed the basis for their discharge. This, in the opinion of the Court, justified

their discharge on the basis of the coerced confessions. The Court made it plain that it was affirming Petitioners discharge because they had committed a crime, although their criminal conduct was not established in a court of law, nor in any manner which comports with a judicial determination of guilt.

REASONS FOR GRANTING THE WRIT

1. The court below ruled that a police officer's job is such that he is always, in all areas of his life, answerable to his employers. This, the court reasoned, justified an inquiry into petitioners' private lives which was in reality an investigation of alleged criminal conduct, but which, as

a supposed "administrative proceeding" could be conducted in the absence of petitioners' counsel and in violation of their Fifth Amendment privilege. The ruling of the court below is in conflict with decisions of this Court defining the relationship between the right of a police officer to exercise the privilege against self-incrimination and his right to continued employment.

In Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913 (1968), this Court held that a policeman could not be required to forego his privilege against self-incrimination in order to retain his job. Recognizing that the role of a police officer is one of great public trust, this Court foresaw some situations, however, in which his responses could be

compelled or his silence used as a ground for his dismissal:

> "If appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. State of New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal." Id., at 392 U.S. 378.

See also, Spevak v. Klein, 385 U.S.

511, 519-20, 87 S.Ct. 625, 630 (1967) (Fortas, J., concurring).

This Court did not elucidate further on the critical language "specifically, directly and narrowly relating to the performance of his official duties." Instead, it gave an approach, which suggests that an investigation designed to elicit from a state employee's own mouth evidence of his guilt of a crime is not one which prevents the invocation of his privilege on pain of dismissal. Hence, in Uniformed San. Men Ass'n. v. Com'r. of San., 392 U.S. 280, 88 S.Ct. 1917 (1968), a case decided with Gardner, this Court said that the petitioners were entitled to remain silent and retain their jobs "because it was

clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition could be used to prosecute them criminally."

What emerges from the foregoing decisions is, as Mr. Justice Harlan said in his concurring opinion, "a procedural formula whereby. . . public officials may now be discharged. . . for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). It is this "procedural formula" which was misconceived by the court below and which is put in question here.

Nothing in the opinions of this Court suggests, as the court below

apparently believed, that an inquiry into the private lives of police officers is justified because it may have a bearing upon their ability to perform their jobs. On the contrary, every indication is that wholly private, personal relationships are protected from all governmental interference. See, e.g., Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965).

Nor did the decisions of this Court intimate that an administrative inquiry, without the procedural safeguards attendant upon an investigation of crime (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 [1966]) is permissible because a policeman ought not to commit crimes. What has been suggested

by this Court, and should now be articulated clearly to give guidance for future investigations of the sort here involved, is quite different.

The focus must be upon the true character of the inquiry. If the inquiry is in actuality a criminal investigation, it must be accompanied by the panoply of constitutional rights, including the right to remain silent, unfettered by threat of loss of employment. Gardner v. Broderick, supra; Uniformed San. Men Ass'n. v. Com'r. of San., supra. Cf. Miranda v. Arizona, supra. If the investigation is merely one to ascertain whether the officer has been performing his job with the requisite proficiency, he may be required to respond or face the penalty of his refusal. Nor is the public harmed by such a rule, as the

court below asserted. For, if the police officer's conduct is, in fact, contrary to the law, he is subject to prosecution and removal from his office for his constitutionally proven misconduct. See, e.g., California Government Code §1029. (In the interim, the police officer is subject to suspension, which certainly assures that there will be no adverse results from his continued employment during the criminal investigation.) If not, the public is amply protected by the right of the employer to make full inquiry into the manner in which the police officer is doing his job.

In other words, the public is entitled to employment practices which are designed to provide an efficient

police department. It neither needs or requires nor is it constitutionally entitled to have what the court below tried to give it: employment practices designed to enhance the administration of criminal justice.

2. There was, in the instant case, more than an investigation which went beyond the scope permitted by this Court as indicated above. The inquiry here focused upon the most private of all possible matters: the marital relation. Griswold v. Connecticut, supra. The court below attempted to justify the gross invasion of petitioners' privacy by alluding to the arguable fact that it is illegal to procure an abortion under the circumstances revealed by

petitioners' confessions. [2] See California Penal Code §§182, 274, 275.

But the question before the court below was not the legality of petitioners' conduct, but whether it was constitutionally permissible to condition petitioners' continued employment upon an invasion of their privacy. Regardless of how this Court decides whether or not a police officer must subject himself to an inquiry which relates to criminality (because it also relates "specifically, directly

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[2] In order to arrive at its position the court had to rely upon the very statements which petitioners are urged were not admissible for any purpose, contrary to the principle which prohibits justifying an invasion of a constitutional right by the evidence thereby derived. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

and narrowly. . . to the performance of his official duties" [see, e.g. McCain v. Sheridan, 160 C.A.2d 174, 324 P.2d 923 (1958)]) it must condemn an employer's investigation into his bedroom. For the constitutional right of privacy is as precious to a police officer as to anyone and a vindication of his right to privacy is dependent upon this Court's prohibition of an employer's inquiry into a police officer's private relations. Cf. Stanley v. Georgia, supra; Griswold v. Connecticut, supra; Norton v. Macy, 417 F.2d 1171 (D.C. Cir. 1969). Furthermore, the shifting mores of our society make such inquiry particularly offensive and subject to clearly erroneous conclusions by the employer. One need only consider that

as regards abortion, a Federal court has recently said:

> ". . . that a woman has a constitutional right of privacy cognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages free from unreasonable interference by the state." Y.W.C.A. v. Kugler, 10 Cr.L. 2469 (3-29-72).

And the California Supreme Court has once struck down an anti-abortion statute in the context of a criminal prosecution for violation of the statute and is now considering the validity of the newer California

Therapeutic Abortion Act.

The court below, looking at the results of the inquiry, incorrectly concluded that petitioners had no constitutional right to refuse to discuss with their employer their alleged criminal conduct. The correct question before this Court is whether petitioners had a constitutional right to be free of their employer's attempt to invade their privacy.

3. The court below erroneously held that petitioners' confessions, elicited under the constitutionally infirm circumstances above described were not coerced because the case of Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967) had removed the threat of self-incrimination.

Petitioners were not, of course, advised that if they responded upon pain of loss of employment, Garrity would no doubt have prevented the use of their statements in a criminal prosecution. More significantly, however, petitioners were erroneously directed to answer or lose their jobs. See Gardner v. Broderick, supra; Uniformed San. Men Ass'n. v. Com'r. of San., supra. As the court below noted, they were, indeed, given the choice between "the rock and the whirlpool"--remain silent and be fired, or speak and risk dismissal. The Garrity and Gardner cases together establish that petitioners' confessions were coerced. See Note 71, Col.L.Rev. 734, 740-41 (1971). Cf. Spevak v. Klein, supra. The question remaining

before this Court is whether petitioners' coerced confessions could be used in the Civil Service proceeding as the basis for their dismissals.

In Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966), the court held that a federal civil servant could not be discharged from his employment on the basis of evidence illegally seized in violation of the Fourth Amendment. The court said:

> "It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings, which the Court has analogized to proceedings that 'involve the imposition

of criminal sanctions * * *.'
Peters v. Hobby, 349 U.S. 331,
344, 75 S.Ct. 790, 797, 99 L.Ed.
1129 (1955); Greene v. McElroy,
360 U.S. 474, 496-497, 79 S.Ct.
1400, 3 L.Ed.2d 1377 (1959)"
(366 F.2d at 640.)

See also Saylor v. United States, 374 F.2d 894 (Ct. Cl. 1967).

These cases offer guidance here for they emphasize that the protection of fundamental constitutional rights requires that the government not be permitted to benefit by its wrongdoing in any proceeding at which that same government seeks to extract a penalty. That principle is applicable whether the state seeks to profit from its invasion of a Fourth or Fifth Amendment

right and whether the penalty which could result is a fine, imprisonment, or what may well be worse for a police officer--loss of employment. Cf. Norton v. Macy, supra, 417 F.2d at 1164.

4. The court below held that petitioners' admission of facts which, if established in a court of law, might have resulted in their conviction of a violation of California Penal Code §§182, 274 and 275, was "per se" sufficient evidence of "unfitness".[3/]

3/ Another basis, approved by the court below, was petitioners' untruthful assertion that the abortion had been performed in Mexico. (Both petitioners also admitted truthfully that it had been performed at their home.) An untruthful statement, made in response to an unconstitutional and improper inquiry, does not subject its author to punishment. See, Note, 22 Stan.L.Rev. 783 (1970). See also, Williams v. United States, 193 Ct. Cl. 440 (1970)(Nichols, J., concurring).

This Court has never decided whether such a "per se" rule meets due process standards. It has, however, held that there must be substantive evidence to justify a denial of employment. See, e.g., Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637 (1956). See also Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752 (1957). That substantive evidence, according to the Court of Appeals, in Norton v. Macy, supra, must be directly related to the employee's ability to perform his job.

3/ (continued) It is comparable to a non-material false statement which may not be prosecuted under 18 U.S.C. §1001. Compare, Bryson v. United States, 396 U.S. 64, 90 S.Ct. 355 (1969); United States v. Knox, 396 U.S. 77, 90 S.Ct. 363 (1969), which approved prosecutions for false responses made in reply to valid inquiries (although an assertion of a Fifth Amendment privilege would also have been valid).

"Thus we think the sufficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do."
(417 F.2d at 1166).

Cf. Gardner v. Broderick, supra; Spevak v. Klein, supra (Fortas, J., concurring). See also, Morrison v. State Board of Education, 1 Cal.3d 214, 82 Cal.Rptr. 175 (1969). It cannot be presumed that because the employee has conducted himself in a particular manner in his personal life, he cannot perform his job.

In rejecting the foregoing principles as they apply to police

officers in general and to petitioners in particular, the court below said: "Nothing could be more relevant to a law officer's fitness to uphold the law than his own demonstrated attitude towards the law he is commissioned to uphold" (Appx. A, p. 11). This can offer no justification for the adoption of a "per se" rule. A police officer may be opposed to laws prohibiting certain kinds of sexual conduct, petty gambling, marijuana or pornography, to indicate but a few areas of the law caught up in our changing social values (in addition to the abortion problem here directly involved). He may even read "girlie" magazines, play cards for money in his own home, have sexual relations with his wife of a sort prohibited by law, and

even smoke marijuana. But the inquiry, if such facts are revealed must still be: Can he do the job he is assigned to do?

The court below has chosen a course which avoids focusing upon this problem, and which consequently permits a police officer arbitrarily to be dismissed from his employment. Such a procedure is not compatible with concepts of due process of law, and must be condemned by this Court.

CONCLUSION

For the foregoing reason, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District,

Division Two.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

By: MARTHA GOLDIN

Attorneys for Petitioners

APPENDIX.

Opinion of the Court of Appeal.

[Civ. No. 38755. Second Dist., Div. Two. Mar. 27, 1972.]

Betty L. Gerace et al., Plaintiffs and Appellants, v. County of Los Angeles et al., Defendants and Respondents.

Summary

Petitioners, husband and wife, were discharged from their jobs as deputy sheriffs for having conspired to secure and for securing an unlawful abortion for the wife, for having failed to arrest each other, as well as the abortionist, for the felony, and for having lied to investigating officers with respect to the location of the abortion. During the administrative investigation that preceded their discharge, petitioners were advised that a refusal to make full, complete, and truthful statements would be grounds for discharge. The petitioners subsequent admitted having secured the unlawful abortion. Petitioners sought and were denied writs of mandate to compel the Los Angeles County Civil Service Commission to set aside its decisions sustaining the petitioners' discharge. (Superior Court of Los Angeles County, Nos. 978421 and 978422, Ellsworth Meyer, Judge.)

The Court of Appeal affirmed the denial of the writs. Noting that it was inconsistent with one's duty as a peace officer to wilfully refuse to enforce or to personally violate any currently existing penal statute, the court held that the discharge was proper insofar as based on the violation of the abortion law, regardless of any ultimate finding on the constitutionality of that

law, and regardless of the fact that an abortion was performed when petitioners were off-duty or that petitioners' particular assigned duties did not specifically entail abortion investigation. The court also held that under the circumstances of the investigation, the petitioners were granted immunity from the federal and state criminal prosecution for their conduct and that, in light of this immunity, it was not improper that they were compelled to make statements under threat of discharge for refusing to do so. The court also held that petitioners' immunity made harmless the fact that the husband had not been warned of *Miranda* rights prior to the administrative investigation. (Opinion by Compton, J., with Roth, P. J., concurring. Concurring opinion by Fleming, J.)

Counsel

Lemaire & Faunce and Edward L. Faunce for Plaintiffs and Appellants.

John D. Maharg, County Counsel, Larry Cory and Larry A. Curtis, Deputy County Counsel, for Defendants and Respondents.

COMPTON, J.—This is an appeal from a judgment of the Superior Court of Los Angeles County denying a peremptory writ of mandate in each of two consolidated actions. The petitioned for writs would have ordered the Los Angeles County Civil Service Commission to set aside its decisions sustaining the discharge of two sheriff's deputies.

Allen J. Gerace and Betty L. Gerace, husband and wife, were employed as deputies in the Los Angeles County Sheriff's Department. Allen held the rank of sergeant. Both were discharged on August 5, 1969, when an investigation conducted by the department

revealed that they had jointly solicited and paid for an abortion which was performed upon Betty in the Gerace home during January 1969.

Following the hearing, the Civil Service Commission made findings of fact based on a stipulation of facts entered into by the parties. These findings were:

(1) As to Betty Gerace

(a) that she contacted persons to secure information as to who could perform an abortion on her person;

(b) that she had the abortion;

(c) that she paid for it; and

(d) that when questioned by representatives of the department she lied about the location of the performance of the abortion.

(2) As to Allen Gerace

(a) that he knew of, and allowed, an abortion to be performed upon his wife;

(b) that he paid for the abortion;

(c) that he contacted various individuals in an attempt to find someone who would perform the abortion; and

(d) that when questioned by representatives of the department he lied about the location of the abortion.

From these findings the Commission concluded:

(1) the action of Betty and Allen Gerace in relation to the abortion were actions proscribed as felonies pursuant to sections 182[1] and 275[2] of the Penal Code;

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[1]Penal Code section 182 states in pertinent part: "If two or more persons conspire: 1. To commit any crime. . . . They are punishable as follows: . . . When they conspire to commit any other felony, they shall be punishable in the same manner and

(This footnote is continued on next page)

(2) each had failed to perform his duty as a police officer in not arresting the abortionist and the other member of the marital duo;"

(3) the actions of each were directly related to the performance of his duties;

(4) the commission of acts proscribed as felonies automatically rendered each unfit for service as a peace officer; and

(5) the untrue statement made as to the location of the abortion rendered each unfit for service as a peace officer.

At issue in the hearing before the Civil Service Commission and in superior court on the petition for mandate, was the investigative procedures employed by the sheriff's department. These procedures led to a confession by both Allen and Betty as to the essential facts which were ultimately stipulated to and adopted by the commission.

In attacking the investigation which led to their discharge the Geraces contend that (1) they were coerced into making involuntary statements, and (2) they were questioned about private matters unrelated to their official duties.

Their assault on the discharge itself rests on three major premises: (1) it is the product of an improper investigation as discussed in the preceding paragraph,

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to the same extent as is provided for the punishment of the said felony."

[2]Penal Code section 275 states: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than one nor more than five years."

(2) even admitting the truth of the ultimate facts there was no evidence that the performance of their official duties was thereby affected, and (3) there is a constitutional right to secure an abortion.

Our analysis of these various contentions must begin with an examination of certain relevant policy regulations in force within the Sheriff's Department of Los Angeles County, together with certain statutory law of this state.

The department Manual of Policy and Ethics which governed the conduct of the Geraces as well as all members of the sheriff's department provided inter alia:

"*3120.01 General Behavior.* A member shall not act or behave privately or officially in such a manner as to bring discredit upon himself or the Department."

"*3120.03 Obedience to Laws, Regulations, and Orders.*

"a) Members shall not wilfully violate any Federal statute, State law or local ordinance. According to the nature of the offense, and in conformance with the Rules of the County Department of Personnel, disciplinary action may consist of a reprimand, suspension without pay, reduction in rank, or dismissal from the Department."

"*3120.70 False Statements.* Members shall not make false statements when questioned or interviewed or in reports submitted."

"*3120.71 Statements During Departmental Investigations.* If requested to make a statement in the course of an official Departmental investigation, members shall make full, complete, and truthful statements."

Government Code section 26601 provides: "Arrest. The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."

The duty of the sheriff to arrest criminal violators is also imposed upon his deputies.

Government Code section 1029 provides that a peace officer is to be disqualifed from office for conviction of a felony. While the Geraces have not been convicted of a felony, the underlying principle is applicable.

We next turn to a recital of the significant events that occurred during the department's investigation of the Geraces. In so doing we quote verbatim from their opening brief.

"On May 26, 1969, appellant, Betty Gerace, was interviewed by members of the Sheriff's Department. Mrs. Gerace was told that she must make a full, complete and truthful statement and that she should not make any false statements. The Department representatives then advised Betty Gerace that she was being questioned as to her participation in an alleged abortion and extortion.

"Betty Gerace advised the Department representatives that she did not want to make a statement until she had talked to someone. The Department representatives then advised Betty Gerace that this investigation was an administrative rather than a criminal investigation, and told her that: (a) She did not have the right to have anyone else present; (b) She did not have the right to confer with anyone; (c) Compliance with the Manual of Policy and Ethics was a condition of her job and that refusal to answer was grounds for discharge under the Manual, since it would be tantamount to non-cooperation in an official de-

partment investigation pursuant to Section 3120.71 of the Manual; and (d) Although she could refuse to answer because of her constitutional rights, she would be subject to discharge.

"On that same day, May 26, 1969, appellant, Allen Gerace, went to Captain Elroy Villines, and told the Captain that he wanted to discuss a personal matter in private. Captain Villines told Allen Gerace that he was under investigation and that he would have to give the Department a statement. Allen Gerace told Captain Villines that he did not wish to make a statement, but the Captain advised him he had better make one.

"Department representatives then advised Sgt. Allen Gerace that he was being investigated with respect to an alleged extortion. These representatives then advised Sgt. Gerace that he must make a full, complete and truthful statement and should not make any false statements. Sgt. Gerace was not advised that he had a right to remain silent.

"Also on May 26, 1969, appellant, Betty Gerace, admitted that she had contacted various persons in an effort to secure information as to whom she could contact to obtain an abortion, that she had allowed an abortion to be performed upon her person, at her residence, and that she and her husband had jointly paid $700.00 for the abortion.

"On May 26, 1969, appellant, Allen Gerace, admitted that he knew of and approved of an abortion performed on his wife (the appellant, Betty Gerace), and that he had paid jointly with his wife $700.00 for the operation. Sgt. Gerace admitted that, with the knowledge of his wife, he had contacted various persons in order to secure information as to who could perform such an operation.

"On May 29, 1969, Sgt. Gerace admitted that he had lied about the location of the abortion in his interview on May 26, 1969.

"On May 26, 1969, appellant, Betty Gerace, told the Department representatives that the abortion was performed at her residence. The interviewers stated that they had pictures and implied that Sgt. Gerace had already told them that it was performed in Mexico. Then Betty Gerace said it was performed in Mexico. On May 28, 1969, Betty Gerace admitted that she lied when she stated that the abortion took place in Mexico."

Before discussing the dilemma in which the Geraces found themselves at the time they were questioned it is necessary to consider whether their conduct itself, however discovered and proved, constituted grounds for discharge.

It is undisputed that the abortion which was performed on Betty was in violation of the existing law and that her conduct, and that of the abortionist, constituted felony crimes.[3] Similarly, Allen as a co-conspirator in these crimes was also chargeable with their violation.

Appellants' contention that Betty Gerace had a constitutional right to secure the performance of an abortion in her own home is to deny the validity of a statute

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[3]See Penal Code section 275, *supra.*

Penal Code section 274 provides: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 295950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

duly promulgated and as of this writing, legally valid and enforceable.

Regardless of how the courts may ultimately decide the highly controversial issue of the constitutionality of our abortion statute, it is simply inconsistent with his or her duty of office for a person who is sworn to enforce the law to wilfully refuse to enforce or to personally violate any currently subsisting Penal statute, especially one which the Legislature had denominated to be in the felony class.

Nor is it of any aid to the Geraces that their particular assigned duties[4] did not involve them in the active investigation of the crime of abortion, nor that the questioned activity occurred during off-duty hours.

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[4]At the hearing before the Civil Service Commission, appellant, Betty Gerace, testified as to her assigned duties as follows: (1) From December of 1968 through February of 1969, she was assigned to the Technical Services Division of the Transportation Detail with the specific duty of transporting female prisoners from one area to another. She also occasionally stayed overnight with juries and worked on the desk; (2) During the month of March, April and May of 1969, her duties were the same as they were from December, 1968 through February, 1969; (3) After May 26, 1969, the date of the first interrogation by the sheriff's department, her duties changed so that she was assigned to the misdemeanor warrant desk assigning said warrants to the various substations or police departments. The new duties also entailed handling telephone calls from the public and official agencies requesting information on warrants.

At the hearing before the Civil Service Commission, appellant, Allen Gerace, testified as to his assigned duties as follows: (1) From December of 1968 through February of 1969, he was assigned to the Reserve Forces Bureau, Administrative Division. His duties consisted of doing background investigation on those in the reserve force; (2) From February 1969 to May 26, 1969, his duties were the same, except that he had been assigned one additional duty, that of assisting the Civil Service Commission in interviewing applicants for the positions of deputy sheriff or corrections officer; (3) From May 26, 1969 to August 5, 1969, his duties remained the same, except that he was one of six sergeants assigned to duty one weekend out of six to handle emergency matters involving reserve personnel.

To follow their argument to its logical extreme would mean that only members of the vice squad would be prohibited from patronizing bookmakers or prostitutes, or only members of the narcotics squad would be prohibited from patronizing illicit peddlers of drugs and narcotics and thus immune from questioning about such matters by the department.

It would be an intolerable situation and destructive of the efficient administration of a police agency if such agency could not require some of its members to give truthful information concerning the violation of laws which other members of that same agency were actively engaged in enforcing.

In sum, a law enforcement officer's official duties embrace those of the faithful enforcement of the penal statutes of the jurisdiction and are not circumscribed or limited to a particular specialty which might happen to be the major focus of his current departmental assignment. Nor can his violation of a penal statute be characterized as a private matter simply because it was committed during off-duty hours.

To those who might argue that this is a harsh and unrealistic attitude, we answer that the high quality of law enforcement which exists in this area is directly attributable to the demand of top-level police administration that their personnel adhere strictly to policies designed to prevent the erosion of the competency and integrity of the law enforcement service.

Our attention is directed to *Morrison v. State Board of Education*, 1 Cal.3d 214 [82 Cal.Rptr. 175, 461 P. 2d 375], which stands for the proposition that the discharge of a teacher on the revocation of his teach-

ing credentials must be premised on a showing of unfitness to teach.

(3) Here it is claimed that the department introduced no factual evidence relative to the quality of the Geraces' service in their assigned duties. On the other hand they point to their performance evaluations as proof that they performed their duties competently. They also point out that the jurisdiction of the Civil Service Commission is limited to a determination of whether appellants are fit to perform their duties and it may not label an activity as criminal or felonious.

But *Morrison* offers little comfort to those who posit an untrammeled right to public employment. It clearly and explicitly recognized the "public interest in the elimination of unfit school teachers." The court in *Morrison* insisted " 'The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection' (*Yakov v. Board of Medical Examiners, supra,* 68 Cal.2d 67, 75 [64 Cal.Rptr. 785, 435 P.2d 553]), and terms such as 'immoral,' 'unprofessional,' and 'moral turpitude' constitute only lingual abstractions until applied to a specific occupation and given content by reference to fitness for the performance of that vocation." (At p. 239.)

The equation of commission of felonies by a peace officer, and the attempted concealment of such misconduct to unfitness for office, is considerably more than "lingual abstractions."

Nothing could be more relevant to a law officer's fitness to uphold the law than his own demonstrated attitude towards the law he is commissioned to uphold.

Addressing ourselves now to the investigative procedures employed it is readily apparent that Allen and

Betty Gerace's tenure with the sheriff's department was doomed when investigators from that department sought to question them.

(4) They were at that time required by the departmental manual to answer the questions and answer them truthfully. Either a refusal to answer or an untruthful answer was grounds for discharge and under the circumstances here a truthful answer would have the same result.

Thus, it is argued that under the coercion that thus existed their truthful answers which were tantamount to a confession should not be used against them as a basis for discharge.

Garrity v. New Jersey, 385 U.S. 493 [17 L.Ed.2d 562, 87 S.Ct. 616], cited by appellants as supporting the thesis that the confessions were involuntary and thus excludable, in reality stands for quite a different proposition when read in context of the facts of the case in hand. *Garrity* involved the reversal of a conviction for crime based on statements given by a defendant policeman only after he had been advised that refusal to testify would bring about his removal from office. The heart of *Garrity* was the coerced statement which was later used against him in a criminal prosecution. The evil condemned was the threat of loss of status as a weapon against the use of the privilege against self-incrimination. In the present case, however, no possible later self-incrimination at a subsequent trial was available since the department had given up for all times the right to use the appellants' words against them in any criminal prosecution. *Garrity, supra*, on the other hand, not only demanded testimony under penalty of discharge but at the same time re-

moved the shield of the Fifth Amendment of the United States Constitution when the same testimony was used at trial. It was because of *Garrity* that the Geraces could not be tried but could be compelled to speak.

Gardner v. Broderick, 392 U.S. 273, at p. 278 [20 L. Ed.2d 1082, at pp. 1086-1087, 88 S.Ct. 1913], which also dealt with discharge for invocation of a constitutional right is most pertinent here.

"If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being requested to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal."

Gardner, supra, at p. 276, after reciting with approval the breadth of the privilege against self-incrimination also notes that "The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. *Counselman v. Hitchcock, supra* [142 U.S. 547], at 585-586; *Murphy v. Waterfront Commission, supra* [378 U.S. 52], at 79."

(5) In brief, neither one of the appellants were required to give up immunity. In fact, they were specifically granted one by the form of the investigation and indirectly but nonetheless effectively by the compulsion of testimony. Such immunity removed any constitutional objection to compelling their answers.

When the department chose to invoke administrative procedures to inquire into their fitness as police officers and most particularly when they chose to compel answers by invoking the Manual of Policy and Ethics, the appellants became secure from prosecution as surely as if a grant of immunity had been given to them.

(6) In line with our conclusion it necessarily follows that any failure to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602], is not fatal to the use, in a discharge hearing, of statements obtained in an administrative investigation of the type conducted here. (See *In re Groban*, 352 U.S. 330 [1 L.Ed.2d 376, 77 S.Ct. 510].)

(7) It is further urged that the department's investigative procedures were overbroad and thus violative of their constitutional rights. It is maintained the investigation and questioning was *not specifically, directly and narrowly related to the performance of their official duties* as mandated by *Gardner v. Broderick, supra*, and *Sanitation Men v. Sanitation Comm'r.*, 392 U.S. 280 [20 L.Ed.2d 1089, 88 S.Ct. 1917]. Appellants claim the information sought was of a private and personal nature and not related to their official duties and therefore the department could not lawfully advise them that a refusal to answer all questions was a proper ground for discharge.

This contention we have already disposed of by our holding that their conduct was not a private matter and that it did relate to their official duties. Thus any question concerning such conduct was permissible.

Fitness to serve as a policeman and criminal behavior are antithetical and antagonistic and cannot coexist. Illegal acts are inconsistent with a dedication to their elimination. As with fire and water, these elements are simply not miscible. To advance the proposition that the behavior here was so personal as to prevent a reasonable inquiry into criminal behavior and its bearing on fitness for law enforcement duty would be to exalt privacy to a hitherto unknown height.

The case of *McAuliffe v. Mayor, etc. of City of New Bedford,* 155 Mass. 216 [29 N.E. 517], is still in harmony with the law of California. The pertinent quotation by Justice Holmes is as follows: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech [or here, his or her right of privacy] as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." (For accord see *Christal v. Police Commission,* 33 Cal.App.2d 564 [92 P.2d 416]; *Steinmetz v. Cal. State Board of Education,* 44 Cal.2d 816 [285 P.2d 617]; *Fichera v. State Personnel Board,* 217 Cal.App. 2d 613 [32 Cal.Rptr. 159] *McCain v. Sheridan,* 160 Cal.App.2d 174 [324 P.2d 923].)

The judgment is affirmed.

Roth, P.J., concurred.

FLEMING, J.—The discharge of a public employee who has wrapped the cloak of a popular cause around

his transgressions often produces the hard case that makes the law look bad.

Here, the discharge of two public employees for acts having some connection with the procurement of an abortion, at first blush appears at odds with current constitutional expansionism in the sphere of personal rights and current demographic policy designed to counter the population explosion. Appellants argue the inquisition which led to their discharge did not specifically, directly, and narrowly relate to the performance of their official duties (*Gardner v. Broderick* (1968) 392 U.S. 273, 278 [20 L.Ed.2d 1082, 1086, 88 S.Ct. 1913]) but rather centered upon their personal lives and therefore invaded their privacy and infringed their constitutional rights.

Yet the catalyst which precipitated the investigation was not suspected abortion but suspected extortion. The sheriff initiated his investigation on citizen's complaint that members of the Los Angeles Sheriff's Department extorted money from the complainant by threats against his physical safety. Axiomatically, a law enforcement agency with any pretensions to the name must give highest priority to the investigation of criminal complaints against its own employees. Nothing less than the most rigorous inquiry into complaints of extortion by a peace officer will satisfy the public interest, and this is so whether the claimed extortion is connected with the peace officer's official duties or with his extracurricular and moonlighting activities.

A thorough investigation of the extortion complaint was thus required. Once launched, the investigation ran its course, and that course included the inquisition in which appellants committed the transgressions

summarized in the trial court's decision. At least two of those transgressions warranted appellants' discharge as peace officers, wholly apart from the question of their procurement of the abortion itself.

(1) *False statements given to investigative officers in the course of an official investigation.* The authority of the sheriff to command truth from his peace officers during an official investigation should be unquestioned; otherwise the age-old question Who Watches the Watchmen will receive an insatisfactory answer.

(2) *Refusal to disclose the identity of the abortionist.* The sheriff is entitled to require his deputies to reveal the identities of felons he is charged with apprehending. Regardless of the present attitude of the law toward the procurement of abortions, no court has yet suggested that activities of unlicensed mercenary abortionists have been or should be legitimated. Since the sheriff is charged with the apprehension of such persons he may require his deputies to assist him in the performance of that duty to the fullest extent possible.

Thus, viewed in true perspective, the cause arose from a complaint of extortion by deputy sheriffs, in the investigation of which the sheriff became entitled to demand truthful answers from his deputies, and the deputies became obliged to give truthful answers to the sheriff. When appellants failed to do this, their discharge as peace officers became warranted. Indeed, it is difficult to see how the sheriff could have acted otherwise and still preserved the integrity of his office.

Crim Dec

June 23, 1972

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Civil No. 38755

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GERACE ET AL,

v.

COUNTY OF LOS ANGELES ET AL.

FILED

JUN 7-1972

G. E. BISHEL, Clerk

Appellants' petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed March 27, 1972, and appearing in 24 Cal. App. 3d 347. (Cal. Const., Art., VI, Section 14; Rule 976, Cal. Rules of Court.)

Peters, J., and Mosk, J., are of the opinion that the petition should be granted.

WRIGHT

Chief Justice

Appendix B.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

4. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

5. The provisions of the Ninth Amendment to the United States Constitution are:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

". . . or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

7. The pertinent provisions of §182 of the California Penal Code are:

"If two or more persons conspire: 1. To commit any crime. . . . They are punishable as follows: . . . When

they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony."

8. The provisions of §274 of the California Penal Code are:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 295950) of Division 20 of the Health and Safety Code, is

punishable by imprisonment in the state prison not less than two nor more than five years."

9. The provisions of §275 of the California Penal Code are:

"Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than one nor more than five years."

10. The pertinent provisions of §1029 of the California Government Code are:

> ". . . any person who has been convicted of a felony in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony if committed in this state, is disqualified from holding office or being employed as a peace officer of the state, county, city, city and county or other political subdivision, whether with or without compensation, and is disqualified from any office or employment by the state, county, city, city and county or other political subdivision, whether with or without compensation, which confers

upon the holder or employee the powers and duties of a peace officer."

11. The provisions of §26601 of the California Government Code are:

"arrest. The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-388

BETTY L. GERACE and ALLEN J. GERACE,
Petitioners,

vs.

COUNTY OF LOS ANGELES, a legal subdivision of the State of California, CIVIL SERVICE COMMISSION of the County of Los Angeles, The Office of Sheriff of Los Angeles County, PETER J. PITCHESS, Sheriff,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

OPINIONS BELOW

The Court of Appeal opinion in this matter is attached to the Petition as Appendix "A," and the Order of the California Supreme Court denying a hearing is attached to the Petition as Appendix "B." A true and correct copy of the Findings of Fact and Conclusions of Law of the Civil Service Commission of the County of Los Angeles is set forth as Appendix "A" to this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the admitted commission by local peace officers of acts proscribed as felonies and the failure to make any arrests in connection with such acts justifies the requirement that such officers account for their conduct.

2. Whether attempts to conceal misconduct by false statements in lieu of any assertion of rights against self-incrimination constitutes sufficient grounds for discharge of local peace officers.

STATUTES INVOLVED

The provisions of Sections 3120.70 and 3120.71 of the Manual of Policy and Ethics of the Los Angeles County Sheriff's Department are set forth as Appendix "B" to this Brief.

STATEMENT OF THE CASE

The content of the Sheriff's Department's questions to Petitioners; the actions of Petitioners leading to their discharges; and the chronology of events in the Civil Service Commission and Courts below are correctly set forth in the Petition.

In fact, Petitioners' acts and the conduct by the

Sheriff's Department of its administrative investigation cannot be in dispute, since both were entered into evidence in Civil Service Commission proceedings by stipulation of the parties.

Subsequent to full hearing on the merits, the Civil Service Commission rendered its Findings of Fact and Conclusions of Law, and its Order, which are set forth in full as Appendix "A" to this Brief. The Commission found that Petitioners had engaged in actions "proscribed" as felonies under California law, and that this fact, as well as the failure to make any arrests and the attempts to conceal these actions by false statements were inconsistent with the continuation of Petitioners' status as peace officers.

REASONS FOR DENYING THE WRIT

I

QUESTIONING OF PETITIONERS RELATED SPECIFICALLY, DIRECTLY AND NARROWLY TO PERFORMANCE OF THEIR OFFICIAL DUTIES, AND THEIR DISCHARGES WERE FOR THE BREACH OF SUCH DUTIES.

Throughout the course of this action, Respondents have relied upon the language from *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913 (1968), as quoted on page 18 of the Petition. The ultimate factual determination required in the instant matter by the criteria set forth in *Gardner* is whether the commission of acts proscribed as felonies under the California

Penal Code and the failure to make any arrests in connection with such acts bears a sufficient nexus to the official duties of a local peace officer.

It is important that the administrative investigation of Petitioners' activities began upon the basis of a citizen complaint concerning attempted extortion by a peace officer; it is certainly entirely reasonable in the investigation of such a complaint to inquire into the underlying facts, which in this instance involve the performance of an abortion upon Petitioner Betty L. Gerace.

Furthermore, Petitioners should not be heard to argue that their actions are protected because the abortion occurred during Petitioners' "off duty" hours. Although it is true that Petitioners were not on pay status during the activities in question, courts have generally been consistent in their observations that:

> "... Any rule that a peace officer only functions while on active duty would unnecessarily weaken the fabric of law enforcement." (*People v. Hooker*, 254 Cal. App. 2d 878, 883, 62 Cal. Rptr. 675 (1967)); Also see: *People v. Derby*, 177 Cal App. 2d 626, 630-631, 2 Cal. Rptr. 401 (1960); *People v. Townsend*, 20 Cal. App. 3d 688, 694-696 (1971); *Hammer v. Wells Fargo & Co. Express*, 174 App. Div. 724, 160 N.Y.S. 651.

Although Petitioners have occasionally argued that even as peace officers they had no duty to arrest each other for commission of the stipulated acts, Petitioners

have never provided this Court or any other court hearing the matter with adequate justification for failure to arrest the person performing the abortion. Thus, Petitioners' actions display a clear breach of their duties of arrest pursuant to California Government Code, Section 26601.

Even if it is assumed that the Provisions of California's Therapeutic Abortion Act (California Health and Safety Code, Sections 25950 et seq.), are in some manner constitutionally deficient, these provisions were nevertheless in full force and effect in January, 1969, when the abortion was performed. Law enforcement officers must not be allowed to obey and enforce only those laws which they find personally convenient, and then speculate upon the outcome of their actions. Such a result is not conducive to the maintenance of a society based upon a rule of law.

Implicit in Petitioners' arguments is the assumption that they were somehow subjected to prosecution of a "criminal" nature. In fact, it is clear that the questioning of Petitioners by their employer effectively granted them a complete immunity from the use of any of their answers or the fruits thereof in a subsequent criminal prosecution under the holding of this Court in *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967). Respondents have never argued otherwise and have consistently adopted the position that Petitioners' answers were of utility solely for the purpose of the administrative actions in question.

A requirement that Petitioners' employer, who was coincidentally a law enforcement officer, ignore the conduct demonstrated by Petitioners would:

> ". . . incur a risk of danger to the public which, at least as of this date, outweighs the competing considerations of a problematical gain in deterrence." (*In re Martinez*, 1 Cal. 3d 641, 650, 463 P. 2d 734, 83 Cal. Rptr. 382 (1970) cert. denied, 400 U.S. 851)

II

PETITIONERS WERE PROPERLY DISCHARGED FOR THE GIVING OF FALSE ANSWERS IN LIEU OF ASSERTION OF A PRIVILEGE AGAINST SELF-INCRIMINATION.

A separate and independent ground for the discharge of Petitioners was their attempt to conceal the nature of their actions by false statement concerning the location of the abortion (presumably upon the basis of their assumption that the performance of such an abortion in Mexico would have rendered it legal). Assuming that the questioning directed to Petitioners was in fact "specifically, directly and narrowly related to the performance of [their] official duties," Peitioners had the alternative of truthfully answering the propounded questions or asserting a right against self-incrimination and refusing to answer. The third alternative of attempting to falsify evidence was not legally permissible.

In *United States v. Knox,* 396 U.S. 77, 24 L. Ed. 2d 275, 90 S. Ct. 363 (1969) this Court rejected the contention that the Fifth Amendment gave the right to file a falsified tax return. In sustaining appellant's conviction, this Court noted:

> "In *Bryson v. United States,* 396 U.S. 64, 24 L. Ed. 2d 264, 90 S. Ct. 355 (1969), we reaffirmed the holding of *Dennis v. United States,* 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (1966), that one who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." (396 U.S. 77, 79)

Thus, Petitioners cannot be heard to challenge Sections 3120.70 and 3120.71 of the Sheriff's Manual of Policy and Ethics under the guise that these sections imposed unreasonable limitations upon Petitioners' actions.

Furthermore, it is submitted that Petitioners had a duty to give truthful answers that was independent of any statute or rule. This is supported by a statement in *Mackey v. United States,* 401 U.S. 667, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971), where this Court noted that:

> ". . .[E]ven when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prose-

cuted for making false statements." (401 U.S. 667, 705)

In conclusion, it is submitted that the actions and policies of Respondents in this matter were entirely consistent with prior decisions of this Court; and that the restrictions placed upon Petitioners' scope of action during the administrative investigation were entirely reasonable and consistent with necessary attempts to insure the public trust essential for effective support of law enforcement. For these reasons, Respondents therefore respectfully request that the Petition for Certiorari be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By LARRY A. CURTIS
Deputy County Counsel
Attorneys for Respondents

APPENDIX "A"

BEFORE THE CIVIL SERVICE COMMISSION
OF THE COUNTY OF LOS ANGELES

In the Matters of the Discharges of BETTY GERACE and ALLEN GERACE, County Employees and Appellants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for hearing before Thelma T. Mahoney and O. Richard Capen, members of the Civil Service Commission and duly appointed hearing officers, on November 20, and November 26, 1969, and the County of Los Angeles Sheriff's Department being represented by John D. Maharg, County Counsel and Larry A. Curtis, Deputy County Counsel; and the appellants being present and represented by LeMaire, Mohi, Morales, Dumas and Song and Edward Fraunce, their attorneys of record, and evidence being introduced both oral and documentary, and the Hearing Officers having considered the evidence and being duly advised in the premises now make the following

FINDINGS OF FACT AS TO APPELLANT ALLEN GERACE

1. It was stipulated that, Appellant Allen Gerace knew and approved of an abortion performed upon his wife during the latter part of January, 1969, and was present during the abortion, and Allen Gerace and his wife Betty Gerace jointly paid $700 for the abortion.

2. It was stipulated that, Appellant Allen Gerace with the knowledge of his wife, Betty Gerace, contacted a doctor and various other persons for the purpose of obtaining and securing information as to who would perform an abortion upon his wife, Betty Gerace.

3. It was stipulated that, Appellant Allen Gerace was interviewed by Sheriff's Department personnel on May 26, 1969 and May 29, 1969 concerning the above-indicated occurrences, and on May 29, 1969, Allen Gerace admitted that he had lied about the location of the abortion during the May 26, 1969 interview.

4. During all of the above-mentioned occurrences, Appellant Allen Gerace was employed as a peace officed by the Los Angeles County Sheriff's Department.

5. Appellant Allen Gerace was notified by letter dated August 5, 1969 that he was discharged from his position of Sergeant with the Los Angeles County Sheriff's Department effective at the close of business August 5, 1969; said notice was accomplished by personal service upon appellant Allen Gerace.

6. Appellant requested a hearing by letter dated August 11, 1969, which letter was received by the Civil Service Commission on August 11, 1969.

FINDINGS OF FACT AS TO APPELLANT BETTY GERACE

1. By stipulation of the parties, prior to January, 1969, Appellant Betty Gerace contacted various persons for the purpose of securing information as to persons who would perform an abortion upon her.

2. By stipulation of the parties, Appellant Betty Gerace allowed an abortion to be performed upon herself in the latter part of January, 1969, at her residence, and she and her husband, Appellant Allen Gerace, jointly paid $700 for the abortion.

3. It was stipulated that on May 26, 1969, Appellant Betty Gerace was interviewed by personnel of the Los Angeles County Sheriff's Department and "Deputy Gerace stated that the abortion was performed at her residence. The interviewers stated that they had pictures and implied that Sgt. Gerace had already told them that it was performed in Mexico. Then Deputy Gerace said it was performed in Mexico."

4. During all of the above-mentioned occurrences, Appellant Betty Gerace was employed as a peace officer by the Los Angeles County Sheriff's Department.

5. Appellant Betty Gerace was notified by letter

dated August 5, 1969 that she was discharged from her position with the Los Angeles County Sheriff's Department effective at the close of business August 5, 1969; said notice was accomplished by personal service upon Appellant Betty Gerace.

6. Appellant requested a hearing by letter dated August 11, 1969, which letter was received by the Civil Service Commission on August 11, 1969.

CONCLUSIONS OF LAW AS TO APPELLANT ALLEN GERACE

1. The appellant had violated Sections 3120.03 (Obedience to Laws, Regulations and Orders); 3120.70 (False Statements); and 3120.71 (Statements during departmental investigations), of the Manual of Policy and Ethics of the County of Los Angeles Sheriff's Department.

2. The actions of Appellant Allen Gerace in relation to the securing and performance of an abortion for and upon Appellant Betty Gerace as set forth in the above Findings of Fact are actions proscribed as felonies pursuant to Sections 182 and 276 of the California Penal Code.

3. The doing of acts proscribed as felonies by the California Penal Code as set forth above was a breach of the duties of Appellant Allen Gerace at any and all times, including off duty hours, and was further a breach of the duties of Appellant Allen Gerace as

set forth in California Government Code, Section 26601, in that Appellant Allen Gerace had the duty to place the individual performing the Abortion under arrest for the above acts, and, as a separate duty, had the duty to place Appellant Betty Gerace under arrest for the doing of the acts specified in the Findings of Fact as to Appellant Betty Gerace.

4. The conduct of Appellant Allen Gerace as set forth above is directly related to the performance of his duties as a peace officer, and renders him unfit for further service as a peace officer.

5. The doing by a peace officer of acts proscribed as felonies is *per se* inconsistent with the performance of his duties as a peace officer, and renders him unfit for further service as a peace officer.

6. The actions of Appellant Allen Gerace in committing acts proscribed as felonies and attempting to conceal the details of those acts by an untrue statement to Sheriff's Department investigators constitute a breach of the duties of Appellant Allen Gerace as a peace officer, and render him unfit for further service as a peace officer.

7. Any or all of the above Conclusions of Law as to Appellant Allen Gerace are sufficient to support the determination that the Los Angeles County Sheriff's Department be sustained in its discharge of Appellant Allen Gerace.

CONCLUSIONS OF LAW AS TO APPELLANT BETTY GERACE

1. The Appellant has violated Sections 3120.03 (Obedience to Laws, Regulations and Orders); 3120.70 (False Statements); and 3120.71 (Statements during departmental investigations), of the Manual of Policy and Ethics of the County of Los Angeles Sheriff's Department.

2. The actions of Appellant Betty Gerace in relation to the securing and performance of an abortion for and upon Appellant Betty Gerace as set forth in the above Findings of Fact are actions proscribed as felonies pursuant to Sections 182 and 275 of the California Penal Code.

3. The doing of acts proscribed as felonies by the California Penal Code as set forth above was a breach of the duties of Appellant Betty Gerace at any and all times, including off duty hours, and was further a breach of the duties of Appellant Betty Gerace as set forth in California Government Code, Section 26601, in that Appellant Betty Gerace had the duty to place the individual performing the abortion under arrest for the above acts, and, as a separate duty, had the duty to place Appellant Allen Gerace under arrest for the doing of the acts specified in the Findings of Fact as to Appellant Allen Gerace.

4. The conduct of Appellant Betty Gerace as set forth above is directly related to the performance of

her duties as a peace officer, and renders her unfit for further service as a peace officer.

5. The doing by a peace officer of acts proscribed as felonies is *per se* inconsistent with the performance of her duties as a peace officer, and renders her unfit for further service as a peace officer.

6. The actions of Appellant Betty Gerace in committing acts proscribed as felonies and attempting to conceal the details of those acts by untrue statement to Sheriff's Department investigators constitute a breach of the duties of Appellant Betty Gerace as a peace officer, and render her unfit for further service as a peace officer.

7. Any or all of the above Conclusions of Law as to Appellant Betty Gerace are sufficient to support the determination that the Los Angeles County Sheriff's Department be sustained in its discharge of Appellant Betty Gerace.

WHEREFORE, the action of the Department in discharging the said employees and appellants Allen Gerace and Betty Gerace should be sustained and the same employees discharged from their same said position.

DATED this 11 day of March, 1970.

THELMA T. MAHONEY
O. RICHARD CAPEN

BEFORE THE CIVIL SERVICE COMMISSION
OF THE COUNTY OF LOS ANGELES

In the Matters of the Discharges of BETTY GERACE and ALLEN GERACE,	)
County Employees and Appellants.	)

FINDINGS, CONCLUSIONS AND ORDER OF THE CIVIL SERVICE COMMISSION

The Civil Service Commission of the County of Los Angeles, having read the foregoing Findings and Conclusions, and good cause appearing therefor, and the Commission being duly advised in the matter, accepts the Findings and Conclusions of its duly appointed hearing officer Thelma T. Mahoney, and hereby orders that the appeal of Betty Gerace and Allen Gerace be denied.

DATED: this 11 day of March, 1970.

THELMA T. MAHONEY,
President

O. RICHARD CAPEN,
Member

EMMET M. SULLIVAN,
Member

APPENDIX "B"

STATUTES INVOLVED

Manual of Policy and Ethics of the County of Los Angeles Department of Sheriff:

§ 3120.70 *False Statements.* Members shall not make false statements when questioned or interviewed or in reports submitted.

§ 3120.71 *Statements During Departmental Investigations.* If requested to make a statement in the course of an official Departmental investigation, members shall make full, complete, and truthful statements.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-388

BETTY L. GERACE and
ALLEN J. GERACE,

Petitioners,

v.

COUNTY OF LOS ANGELES, a legal subdivision of the State of California, CIVIL SERVICE COMMISSION of the County of Los Angeles, The Office of Sheriff of Los Angeles County, PETER J. PITCHESS, Sheriff,

Respondents.

PETITION FOR REHEARING

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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Respondents.

PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an Order

(1) vacating its denial of the Petition for Writ of Certiorari entered on November 13, 1972, and (2) granting the Petition. As grounds for this motion, petitioners state the following:

THE DECISION OF THE CALIFORNIA SUPREME COURT IN PEOPLE V. BARKSDALE REQUIRES RECONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI.

On November 22, 1972, the California Supreme Court rendered its decision in People v. Barksdale, 8 Cal.3d 320. The court there prohibited the prosecution of a physician who had performed an abortion in violation of the 1967 California Therapeutic Abortion Act

(California Health & Safety Code, Sections 25950 to 25954). The court held unconstitutionally vague those sections of the Act which authorized only abortions which had received advanced approval of a hospital committee defined in the Act, and based upon a finding either that "[t]here is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" or that "[t]he pregnancy resulted from rape or incest."

Although the Barksdale case arose in the context of a criminal prosecution in which it was stipulated that the abortion had not been performed in an accredited hospital, or any hospital (as required by those

portions of the Act which the California Supreme Court held to be constitutional), the court held that the physician could not be prosecuted. Its reason is of particular importance to petitioners. The court said that under its decision, defendant, a licensed physician, was not required to obtain approval for the abortion from a medical committee of any hospital. However, it was unlikely that any medical committee would have known this prior to the court's decision, and hence, defendant would not have been permitted to perform the abortion, without approval, in a hospital.

Petitioners, BETTY and ALLEN GERACE, were discharged from their employment as deputy sheriffs because

they admitted they had procured the performance of an abortion on petitioner BETTY. Although the proscription against abortions then in effect was declared unconstitutional during the pendency of proceedings against petitioners (People v. Belous, 71 Cal. 2d 954 [1969], the Civil Service Commission held that petitioners had committed a crime and were therefore unfit for continued employment.

It is clear that petitioners did not commit a crime (a determination which the Civil Service Commission was singularly unsuited to make, as it utilized procedures which deprived petitioners of due process of law and would not have been possible in a criminal prosecution), and that under

the rationale of the Barksdale case, they were not chargeable with misconduct for obtaining an abortion in the only manner available to them prior to the declaration by the California Supreme Court that the California anti-abortion statute was unconstitutional.

The decision in the Barksdale case emphasizes the due process failings in the determination of petitioners' case. For that reason and for the reasons contained in the Petition for Writ of Certiorari, petitioners pray that this Court grant rehearing of the Order of Denial, vacate the Order, and grant the Petition and review the judgment and

opinion below.

Respectfully submitted,

SALTZMAN and GOLDIN

By Martha Goldin
MARTHA GOLDIN
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

As counsel for the petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Martha Goldin

MARTHA GOLDIN